

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FABIAN ALEXANDOR PROFFIT,

Defendant and Appellant.

D059437

(Super. Ct. Nos. SCD220981/
SCD216691)

APPEAL from a judgment of the Superior Court of San Diego County, Kathleen M. Lewis, Judge. Affirmed, and remanded for resentencing with directions.

Fabian Alexandor Proffit entered a guilty plea to four counts of second degree robbery (Pen. Code, § 211),¹ and admitted that in the commission of each of the robberies he used a dangerous or deadly weapon (§ 12022, subd. (b)(1)). Proffit also admitted that he had suffered a prior robbery conviction, which constituted both a serious felony prior (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and a strike prior (§§ 667,

¹ All further statutory references are to the Penal Code unless otherwise indicated.

subds. (b)-(i), 668, 1170.12). The People offered no deals in exchange for Proffit's plea; however, the court gave an indicated prison sentence with a 17-year lid. The indicated sentence included any prison time which would be imposed for Proffit's violation of his probation in case No. SCD216691, which had been revoked due to Proffit's commission of the new offenses.

On June 24, 2010, the trial court sentenced Proffit to the indicated sentence of 17 years in state prison. At the sentencing hearing the court also awarded custody credits, ordered victim restitution, and imposed various fines and fees.

Proffit did not obtain a certificate of probable cause.

Proffit appeals. His appointed appellate counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We affirm the judgment but remand for resentencing, with directions, to determine Proffit's date of arrest in case No. SCD220981 and, if appropriate, to adjust appellant's custody credits. We also order that the abstract of judgment be corrected and that a copy of the corrected abstract be sent to the Department of Corrections.

I

FACTUAL² AND PROCEDURAL BACKGROUND

Shortly before 9:00 p.m. on May 21, 2009, Proffit, who was wearing a black hooded sweatshirt, jumped out of the back door of a four-door white Chrysler Sebring car with dark-tinted windows and walked quickly toward three women: Karin Guefen;

² Proffit stipulated to the preliminary hearing transcript as the factual basis for his plea. The factual recitation is from the transcript of that hearing.

Marybeth McCarthy; and Laura Gambucci, who were leaving an event at the Museum of Contemporary Art in La Jolla. Proffit stood six to eight inches from Gambucci's face and pointed a BB gun, which appeared to be a real gun, at her face and said, "Give me your bag." She did so. He then pointed the gun at the other two women and said, "And your bag, and your bag, too." Guefen handed Proffit her bag. McCarthy, who had walked ahead of the other two women, had her handbag under her arm: Proffit grabbed the bag. Proffit again pointed the gun at Gambucci, and told the women to turn around and walk the other way. They did so, and Proffit got into the car and sped off on Kline Street. Gambucci and McCarthy were able to read part of the license plate of the Sebring, "6ENW13." The women got into Guefen's car, drove to the first place that was open, Zen Bu restaurant, and reported the incident to the police.

On May 26, 2009, about 10:00 p.m., Kristy Hall was walking to her car in the University Towne Center mall parking lot. A white Sebring car with dark-tinted windows pulled up and stopped within two to three feet of Hall. Proffit got out of the back passenger door of the car and approached Hall. He had a gun in his left hand that was later determined to be a BB gun, and grabbed Hall's right arm. Proffit told Hall to "just give me your purse." Upset and shaken, Hall dropped her purse and cell phone. Proffit grabbed the purse from the ground, jumped into the Sebring and left.

A computer check conducted by police revealed a white Chrysler Sebring with a license plate of 6ERW136 was registered to Proffit, who matched the general description of the suspect as described by the victims. At the time, Proffit was on probation for robbery.

Police stopped a Chrysler Sebring with a license plate number 6ERW136 during a traffic stop. There were four males in Proffit's vehicle at the time; appellant was seated in the left rear passenger seat. Officers searched the vehicle and located a large black replica semiautomatic BB gun concealed under the rear seat and a small baggie containing 1.7 grams of marijuana. Proffit was arrested.

In an information dated August 25, 2009, Proffit was charged with four counts of felony robbery (§ 211). Attached to each count was a section 12022, subdivision (b)(1) allegation that in the commission of the offense Proffit personally used a deadly and dangerous weapon, a simulated BB handgun. The information also alleged Proffit had a prior robbery conviction, which constituted both a serious felony prior (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and a strike prior (§§ 667, subds. (b)-(i), 668, 1170.12). In a guilty plea Proffit pled "to [the] sheet." The People offered no deals in exchange for the plea, but the court gave an indicated sentence of state prison with a 17-year term, to include any sentence which Proffit would receive for violation of his probation in case No. SCD216691.

The court sentenced Proffit to prison for 17 years. In case No. SCD220981 the court selected count 1 as the principal term. On that count it imposed the low term of two years, doubled the term for the strike prior, and added one year for the section 12022, subdivision (b)(1) weapon enhancement. The court consecutively sentenced each of the three remaining robbery counts, finding the counts involved separate incidents and separate victims of violence. As to each of those counts, the court imposed one-third of the middle term, doubled (two years four months). The court then imposed a five-year

term for Proffit's serious felony prior pursuant to section 667, subdivision (a), bringing the total prison term to 17 years. The court awarded 449 days credit (391 actual days and 58 § 2933.1 days). According to the reporter's transcript, the court imposed an \$8,000 restitution fine (§ 1202.4, subd. (b)) and an \$8,000 parole revocation fine, suspended unless parole was revoked (§ 1202.45). Victim restitution was awarded to Gueffen, McCarthy and Gambucci, subject to modification by the court. The court reserved jurisdiction over victim restitution owed to Hall, and secured a waiver of defendant's presence at any restitution hearing. The reporter's transcript also shows the trial court ordered Proffit to pay a court security fee of \$120 (§ 1465.8), an immediate critical needs account fee of \$120 (Gov. Code, § 70373), a criminal justice administration fee of \$154 (Gov. Code, § 29550.1) and a theft fine of \$38 (§ 1202.5).

In case No. SCD216691, in which Proffit's probation had been revoked due to his commission of the new offenses, the court sentenced Proffit to two years in prison, to run concurrently with his sentence in case No. SCD220981. The court awarded 627 days credit (546 actual days and 81 § 2933.1 days). According to the reporter's transcript, the court imposed the previously ordered probation revocation fine (§ 1202.44); a \$200 restitution fine (§ 1202.4, subd. (b)); and a \$200 parole revocation fine, which was suspended unless parole was revoked (§ 1202.45).

Proffit did not obtain a certificate of probable cause.

II

DISCUSSION

Appointed appellate counsel has filed a brief summarizing the facts and proceedings below. Counsel presents no argument for reversal, but asks this court to review the record for error as mandated by *Wende, supra*, 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*), counsel refers to as possible, but not arguable, issues: "1) Whether the trial court erred by failing to award appellant all of his presentence custody credits for the time he served on the older case for which probation was revoked in the instant case prior to his arrest for the new case against his sentence on the new case, which was run concurrent to his sentence on the older case [¶] 2) Whether the trial court abused its discretion by running each count of the robbery on the newer case consecutive when there were four victims and one count committed on a separate occasion . . . [and] [¶] 3) Whether a BB gun qualifies as a dangerous weapon within the meaning of . . . section 12022, subdivision (b) the weapon enhancement to which appellant pled guilty." (Citations omitted.)

We granted Proffit permission to file a brief on his own behalf. He has not responded.

We have reviewed the record for error pursuant to *Wende, supra*, 25 Cal.3d 436, and *Anders, supra*, 386 U.S. 738, including the *Anders* issues identified by appointed appellate counsel. Although we determine that there is no merit to the *Anders* issues identified by appointed counsel, in our review we noticed that there was a potentially meritorious issue regarding the custody credits awarded to appellant and that the

discrepancies between the reporter's transcript and the abstract of judgment regarding the court's oral pronouncement of judgment may require correction. We sought further briefing from the parties. After receiving that briefing, we determine that there is a potentially meritorious issue regarding appellant's custody credits, which must be resolved in the first instance by the trial court. We also determine that the abstract of judgment should be corrected to conform to the court's pronouncement of judgment as stated in the reporter's transcript.

A. *Custody Credits*

In case No. SDC220981, the trial court awarded appellant 449 days custody credit. This award was composed of 391 days actual presentence custody credit and 58 days of section 2933.1 credit. The credit for actual days served was calculated on the basis of an arrest date of May 30, 2009. However, the record is unclear as to the date of arrest: at one point the probation report lists appellant's arrest date as May 30, 2009, and at another it is listed as May 29, 2009. If Proffit was arrested on May 30, the actual presentence custody credit award is correct. If, however, the arrest date was May 29, Proffit is entitled to an additional day of actual presentence custody credit and a potential adjustment in the amount of his section 2933.1 credit.

The resolution of this issue turns on a question of fact. Accordingly, we remand the case to the trial court, with directions to determine the date of arrest and, if appropriate, to adjust the award of custody credits. (§ 1237.1 [the issue of an error in the calculation of custody credits should be first presented to the trial court].)

B. *Correction of the Abstract of Judgment*

There are numerous discrepancies between the reporter's transcript and the abstract of judgment concerning the fines and fees imposed by the trial court at sentencing. As we discuss below, we determine that the abstract of judgment requires correction.

In case No. SCD220981, the reporter's transcript states Proffit was ordered to pay a restitution fine of \$8,000 (§ 1202.4, subd. (b)) and a parole revocation fine of \$8,000, which was suspended unless parole is revoked (§ 1202.45). The reporter's transcript also reflects that the trial court ordered Proffit to pay a court security fee of \$120 (§ 1465.8); an immediate critical needs account fee of \$120 (Gov. Code, § 70373); a criminal justice administration fee of \$154 (Gov. Code, § 29550.1); and a theft fine of \$38 (§ 1202.5).

In contrast to the reporter's transcript, the abstract of judgment states the trial court ordered a restitution fine of \$10,000 and a parole revocation fine in the same amount. The abstract of judgment also states the court security fee ordered was in the amount of \$150, and that the immediate critical needs account fee ordered was in the amount of \$150. The abstract of judgment does not reflect the imposition by the court of a criminal justice administration fee or a theft fine.

In case No. SCD216691, the reporter's transcript shows that the court imposed a \$200 restitution fine (§ 1202.4, subd. (b)); and a \$200 parole revocation fine, which was suspended unless parole is revoked (§ 1202.45). The transcript also reflects the court imposed the previously ordered probation revocation fine (§ 1202.44). The abstract of judgment does not reflect the imposition by the court of any restitution or parole revocation fine, but does reflect the court's imposition of the probation revocation fine.

Conflicts between the court's oral pronouncement of judgment as reflected in the reporter's transcript and the clerk's transcript are generally presumed to be clerical in nature, and are resolved in favor of the pronouncement as reflected in the reporter's transcript, unless the particular circumstances dictate otherwise. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) Here there are no circumstances which suggest that the reporter's transcript is in error; in fact, the record indicates the transcript is correct.

Sentencing was originally scheduled for May 27, 2010, and probation reports were prepared for that date. Sentencing was continued to June 24. During the June hearing the probation officer provided the court with updated custody credit figures. The probation report for case No. SCD220981 is interlineated, in handwriting, not type, with the revised custody credit figures. Additionally, the probation report's typed recommendation of a consecutive sentence in case No. SCD216691 is crossed out. Handwritten in its place the term "c/c" appears, apparently indicating a concurrent sentencing for the probation violation, which is what the reporter's transcript reflects the court elected. Similarly, the probation report's recommended imposition of a \$10,000 restitution and \$10,000 parole revocation fine is interlineated with handwritten figures of \$8,000, which is what the reporter's transcript reflects were the amounts imposed at sentencing. These circumstances suggest that the trial court made the handwritten changes to the typed probation report and that the reporter's transcript of the sentencing hearing correctly reflects the court's oral pronouncement of judgment.

Appellant objects to the correction of the abstract of judgment to reflect the court's imposition of the \$200 section 1202.4, subdivision (b) restitution fine in case

No. SCD216691. Appellant observes that a \$200 restitution fine was imposed at the time probation was granted and contends that the fine imposed by the trial court at sentencing constitutes an improper double fine. We disagree.

Relying on *People v. Arata* (2004) 118 Cal.App.4th 195, 202, appellant correctly asserts that a restitution fine may be imposed only once. But *Arata* is distinguishable because it involved a restitution fine imposed at sentencing in an amount greater than the fines imposed on the original grant of probation, thus requiring that the larger fine be stricken. *Arata* makes clear that a restitution fine that has been imposed upon a grant of probation survives the probation revocation. (*Arata*, at p. 202.) Accordingly, the section 1202.4 subdivision (b) restitution fine pronounced by the trial court and reflected in the reporter's transcript here is nothing more than a reiteration of the original fine that was imposed when probation was granted. As such, there is no need to strike the fine, and it is appropriately included in the corrected abstract of judgment.

Accordingly, we will order that the abstract of judgment be corrected by the trial court to reflect the court's oral pronouncement of judgment as reflected in the reporter's transcript, and that a copy of the corrected abstract be sent to the Department of Corrections. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186 [courts should correct errors in the abstract of judgment and certified minutes].)

DISPOSTION

The judgment is affirmed, but the case is remanded to the trial court for resentencing to determine the limited issue of the date of Proffit's arrest and whether the custody credits awarded to him required correction. If the court finds Proffit was arrested

on May 29, 2009, the court shall award one additional day actual presentence custody credit and adjust the section 2933.1 credit (if numerically appropriate). No credit adjustment shall be made if the court finds that Proffit was arrested on May 30, 2009.

The trial court is ordered to correct the abstract of judgment as follows. In case No. SCD220981, the corrected abstract shall reflect that the trial court ordered a restitution fine of \$8,000 (§ 1202.4, subd. (b)) and a parole revocation fine of \$8,000, suspended unless parole is revoked (§ 1202.45); a court security fee of \$120 (§ 1465.8); an immediate critical needs account fee of \$120 (Gov. Code, § 70373); a criminal justice administration fee of \$154 (Gov. Code, § 29550.1); and a theft fine of \$38 (§ 1202.5). The corrected abstract shall also reflect the amount of any additional custody credits ordered at the hearing to determine Proffit's arrest date. In case No. SCD216691, the abstract of judgment shall be corrected to reflect the reiteration of the \$200 restitution fine (§1202.4, subd. (b)) originally imposed at the time probation was granted and the \$200 parole revocation fine, suspended unless parole is revoked (§ 1202.45). A copy of the corrected abstract of judgment shall be sent to the Department of Corrections and Rehabilitation.

IRION, J.

WE CONCUR:

HALLER, Acting P.J.

McDONALD, J.